Case No. 22-13626

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Anna Lange,

Plaintiff-Appellee

v.

Houston County, Georgia, et al.,

Defendants-Appellants

On Appeal from the United States District Court
for the Middle District of Georgia
(5:19-cv-00392-MTT)

AMICUS BRIEF BY THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF DEFENDANTS-APPELLANTS AND THEIR PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The case number for this *amicus curiae* brief is No. 22-13626, *ANNA LANGE v. HOUSTON COUNTY, GEORGIA, ET AL.*

Amicus Curiae Association of American Physicians and Surgeons is a non-profit corporation that has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Pursuant to Eleventh Circuit Rule 26.1-1(a)(1), the undersigned counsel of record certifies that the parties', including *amicus*'s, list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge, with the following additions:

Association of American Physicians and Surgeons, *Amicus Curiae*

Andrew L. Schlafly, counsel for *Amicus Curiae*.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

/s/ Andrew L. Schlafly
Counsel for Amicus Curiae

Dated: June 10, 2024

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IDENTITY, INTEREST AND AUTHORITY TO FILE[1]

Amicus curiae Association of American Physicians and Surgeons ("AAPS") is a national association of physicians who defend the private practice of ethical medicine. Founded in 1943, AAPS has consistently advocated against health insurance mandates, and has filed many amicus briefs in appellate courts against judicial activism on medicine-related issues. In multiple high profile cases before the U.S. Supreme Court and U.S. Courts of Appeals, AAPS has filed amicus briefs and been cited by Supreme Court Justices as well as federal appellate courts. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 959, 963 (2000) (Kennedy, J., dissenting).

AAPS has a direct interest in opposing the creation of transgender insurance mandates by judicial activism.

STATEMENT OF ISSUES MERITING REHEARING EN BANC

AAPS incorporates herein Defendants-Appellants' corresponding statement.

STATEMENT OF FACTS NECESSARY FOR ARGUMENT OF THE ISSUES

AAPS incorporates herein Defendants-Appellants' corresponding statement.

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[1]Pursuant to FED. R. APP. P. 29(a)(4)(E), undersigned counsel certifies that: counsel for the *Amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *Amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

ARGUMENT

Forcing employers and taxpayers to pay for transgender operations and treatments exceeds the bounds of proper judicial authority. Nothing in the Constitution, federal law, Supreme Court precedents, or precedents of this Court justifies this breathtaking overreach by the panel majority. Multiple precedents of the Supreme Court and this Court stand against burdening employers and taxpayers with funding transgender surgery.

Independent medical experts increasingly recognize transgender operations and treatments to be harmful and, at best, experimental. Most major religions oppose this method of "playing God," and forcing taxpayers to fund this, in bypass of the legislative process, conflicts with religious liberty.

This Court has properly construed *Bostock* as merely holding that "'[a]n employer who fires an individual ***merely for*** being gay or transgender defies'" Title VII. *Eknes-Tucker v. Governor, of the State of Ala.*, 80 F.4th 1205, 1228 (11th Cir. 2023) (quoting *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754 (2020), emphasis added). That narrow meaning of *Bostock* does not compel an employer, let alone taxpayers, to foot the bill for expensive, objectionable medical operations and treatments. Moreover, as Justice Alito and Thomas pointed out in their dissent in *Bostock*: "There is only one word for what the Court has done today:

legislation." *Bostock v. Clayton Cty.*, 140 S. Ct. at 1754 (Alito and Thomas, JJ. dissenting).

The panel decision unjustifiably legislates further from the bench.

I. Existence of a Right Does Not Support a Court-Created Mandate to Fund that Right, as the Panel Majority Essentially Held.

The existence of a federal right does not include a right to force taxpayers to fund expenses in its exercise. This issue has been extensively litigated and repeatedly resolved by the Supreme Court against court-mandated funding for a perceived right.

"'[L]egislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts,'" held the Supreme Court in rejecting a claim conceptually similar to the one here. *Maher v. Roe*, 432 U.S. 464, 479-80 (1977) (quoting *Missouri, K. & T.R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.)). The same flaw in the demand for funding of a particular medical procedure (abortion) in *Maher* also exists here: there is no coherent stopping point for what funding a court could next order. *Maher*, 432 U.S. at 480 n.13. The panel decision opens the door to many additional court-mandated entitlements for transgenders based on a misperception about the scope of *Bostock*, such as a potential new right to paid medical leave for transgender treatments or a new cause of action whenever someone does not use a preferred pronoun. None of this is supported by *Bostock*.

Building on the *Maher* precedent, the Supreme Court held that:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution.

Harris v. McRae, 448 U.S. 297, 317-18 (1980). The right of parents to send their child to a private school, as established in *Pierce* v. *Society of Sisters*, does not mean that "government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to … send their children to private schools." *Id.* at 318.

Employers are not legally obligated to provide health insurance coverage, and only large employers are fined under ACA for not doing so. By driving up the cost of health insurance with a court-ordered mandate that is religiously objectionable to many, the panel decision gives employers an incentive to decline to offer health insurance to their employees altogether.

Nothing in federal law or the *Bostock* decision supports the Court-mandated subsidizing of transgender operations, and the panel decision should be reversed.

II. Transgender Treatments Are Being Discredited throughout Europe, While the Transgender Movement in the United States Has Been Distorted for Political Gain.

Free of the distorting political pressure in the United States to push transgender ideology, Europe is following the science. Far from being "medically

necessary," transgender operations and treatments have been inflicting irreversible harm on many, including children, as widely acknowledged throughout Europe.

A. Transgender Assertions Are Increasingly Rejected by European Medical Experts, while Left-Leaning American Medical Organizations Are "Misleading the Public" as Part of their Political Alliances.

In a direct repudiation of the transgender ideology, Great Britain's National Health Service is updating its constitution to state: "We are defining sex as biological sex."[2] The NHS, which is praised by virtually every politician on all sides of the political spectrum there, has also announced that it is discontinuing transgender treatments on children:

> England's National Health Service (NHS) has stopped prescribing puberty blockers for children and young people with gender dysphoria or gender incongruence, saying there is "not enough evidence to support the safety or clinical effectiveness" of puberty-suppressing hormones.

Tara John, "England's health service to stop prescribing puberty blockers to transgender kids," *CNN* (March 15, 2024).[3]

Nearly every other European country has likewise turned against the transgender ideology being politically promoted in the United States at this time. Last year "Norway, hardly the model of extreme, right-wing Christian

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[2] "NHS to enshrine biological sex in its constitution" (Apr. 30, 2024) https://care.org.uk/news/2024/04/nhs-to-enshrine-biological-sex-in-its-constitution#:~:text=Now%2C%20the%20constitution%20is%20to,of%20the%20opposite%20biological%20sex.%E2%80%9D (viewed May 25, 2024).

[3] https://www.cnn.com/2024/03/13/uk/england-nhs-puberty-blockers-trans-children-intl-gbr/index.html (viewed May 24, 2024).

fundamentalism, joined a growing number of European countries earlier this year in a move to restrict gender-affirming care for minors" due to a lack of medical evidence justifying them. Kaylee McGhee White, "Europe wakes up to the harms of 'transgender' affirmation as the US races off the cliff," *Washington Examiner* (June 6, 2023).[4]

In April 2024, a comprehensive study of transgender treatment on children was published in England, called the "Cass Review," which is freely available and summarized online.[5] This study is recognized as "landmark" by the *New York Times*, which published an in-depth interview of leader of this work, Dr. Hilary Cass, who for "30 years [has been] one of England's top pediatricians."[6]

> As the *New York Times* reported:
>
> Dr. Cass's findings are in line with ***several European countries that have limited the treatments after scientific reviews***. But in America, where nearly two dozen states have banned the care outright, medical groups have endorsed the treatments as evidence-based and necessary.[7]

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[4] https://www.washingtonexaminer.com/opinion/beltway-confidential/2770118/europe-wakes-up-to-the-harms-of-transgender-affirmation-as-the-us-races-off-the-cliff/ (viewed May 25, 2024).

[5] The Cass Review, Final Report. https://cass.independent-review.uk/home/publications/final-report/ (viewed May 25, 2024).

[6] Azeen Ghorayshi, "Hilary Cass Says U.S. Doctors Are 'Out of Date' on Youth Gender Medicine, *New York Times* (May 13, 2024). https://www.nytimes.com/2024/05/13/health/hilary-cass-transgender-youth-puberty-blockers.html (viewed May 25, 2024).

[7] *Id.* (emphasis added).

Dr. Cass criticizes the "fairly left-leaning" medical groups in the United States that insist on denying the harm caused by transgender treatments:

> I respectfully disagree with them on holding on to a position that is now demonstrated to be out of date by multiple systematic reviews.
>
> It wouldn't be too much of a problem if people were saying "This is clinical consensus and we're not sure." But what some organizations are doing is doubling down on saying the evidence is good. ***And I think that's where you're misleading the public***. You need to be honest about the strength of the evidence and say what you're going to do to improve it.[8]

B. In the United States, Political Alliances – Not Medical Science – Drive the Exaggerated Push for Special Transgender Entitlements.

Medical science is not driving the overcharged transgender movement in the United States. Political alliances are. The assertions of "medical necessity" for transgender operations in the United States are encouraged by political alliances in D.C. Transgender surgeries are unlike reconstructive surgeries to repair physical injuries, and the panel majority erred in ordering the funding of surgeries that might be politically rather than scientifically justified.

"Yes, we should absolutely follow the science. But that doesn't mean we should always follow scientists. Because scientists don't always follow the science." *Ass'n of Am. Physicians & Surgeons Educ. Found. v. Am. Bd. of Internal Med.*, No. 23-40423, 2024 U.S. App. LEXIS 13321, at *26 (5th Cir. June 3, 2024) (Ho, J., dissenting in part).

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[8] *Id.*

Last year nearly 20 Biden-aligned American medical societies, including the American Medical Association, all agreed to include their names in a high-profile, Democratic Party Resolution of Congress that locks these groups into a political commitment to support the transgender agenda. *See* H. RES. 269 (introduced 03/30/2023).[9] This is based on lobbying in D.C. and currying favor with one political party, not medicine. This political alliance and commitment renders it unlikely that these same organizations will genuinely "follow the science" as European medical organizations have done in repudiating falsehoods that promote transgender operations and treatments.

III. Judicially Created Health Insurance Mandates Are Harmful and Beyond Legitimate Judicial Authority.

The panel decision creates, out of whole cloth, a costly new mandate for employers and taxpayers. Conceptually, this is no different from a court ordering a county to raise taxes, which is not a proper judicial function. "Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement." *Harris v. McRae*, 448 U.S. at 318. "Governmental decisions to spend money to improve the general public welfare in one way and not another are ***'not confided to the courts***. The discretion belongs to Congress, unless the choice is clearly wrong, a

[9] https://www.congress.gov/bill/118th-congress/house-resolution/269/text (viewed June 8, 2024).

display of arbitrary power, not an exercise of judgment.'" *Bowen v. Owens*, 476 U.S. 340, 345 (1986), quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976), quoting *Helvering v. Davis*, 301 U.S. 619, 640 (1937), emphasis added).

The above-referenced Resolution is pending now in Congress to seek to "eliminat[e] unnecessary governmental restrictions on the provision of, and access to, gender-affirming medical care and counseling for transgender and nonbinary adults and youth." H. RES. 269. The judiciary has no part whatsoever in this dispute.

The issue of federally mandated employer benefits is similar to disputes as to Social Security Act entitlements, about which the judiciary defers to Congress. "Congress faces an unusually difficult task in providing for the distribution of benefits under the [Social Security] Act. The program is a massive one, and requires Congress to make many distinctions among classes of beneficiaries while making allocations from a finite fund." *Owens*, 476 U.S. at 345.

Judicial activism that imposes mandates on businesses and taxpayers adversely affects our economy, and the *Wall Street Journal* Editorial Board is right to object. It wrote on May 10, 2024, about an analogous en banc 8-6 en banc decision by the Fourth Circuit, "A Constitutional Right to Gender Surgery? An appeals court uses the Bostock ruling to usurp state law, in a new version of *Roe v.*

Wade."[10] The *Wall Street Journal* Editorial Board describes the Fourth Circuit ruling in *Kadel v. Folwell* as "a doozy" by ending the exclusions for coverage by West Virginia Medicaid and North Carolina's teachers' health insurance of exclusion for sex change treatments. 100 F.4th 122 (4th Cir. 2024).

IV. The Panel Decision Conflicts with Religious Liberty.

Transgender operations are at odds with nearly all major religions in the United States, and thus judicially forcing businesses and taxpayers to fund transgender operations causes conflicts with religious liberty. While legislatures could sort out the looming conflicts, imposing a transgender ideology by judicial fiat cannot. The *Bostock* precedent that it is unlawful to fire "an individual merely for being gay or transgender" does not justify requiring everyone to fully fund and accept the transgender ideology, contrary to many religious faiths.

The two largest Christian denominations in the United States, the Roman Catholic Church and the Southern Baptist Convention (SBC), fully reject transgender ideology and attempts to change one's birth gender. The widely publicized statement by the Vatican in April 2024 requires that "we are called to protect our humanity, and this means, in the first place, accepting it and respecting

[10] https://www.wsj.com/articles/a-constitutional-right-to-gender-surgery-14th-amendment-fourth-circuit-bostock-3a0b4dfa (viewed May 25, 2024).

it as it was created."[11] This document requires adhering to the biological gender of others, and not changing it to suit a gender theory. The large Franciscan University in Ohio, where Justice Sam Alito delivered its commencement address this spring, announced that it will adhere to the gender-at-conception doctrine of the Catholic Church and that no one will be required to refer to others by any different pronoun. Similarly, the SBC in 2022 adopted a resolution reaffirming its "opposing gender-affirming health care, calling such care 'spiritually destructive.'" Liam Adams and Katherine Burgess, "Southern Baptists take first step in approving ban on women pastors," *The Tennessean* (June 14, 2023).[12]

"Orthodox Judaism generally does not accept that a person can change gender/sex." Aaron H. Devor, "Transgender People and Jewish Law," *Transsexualität in Theologie und Neurowissenschaften* (De Gruyter 2016).[13] As to Islam, Abbas Shouman, the secretary-general of Al-Azhar's Council of Senior Scholars in Cairo, was quoted as saying that "for us, … sex conversion is completely rejected. It is [Allah] who has determined the ... sex of the fetus and

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[11] Declaration of the Dicastery for the Doctrine of the Faith "Dignitas Infinita" on Human Dignity (April 8, 2024) (inner quotations and footnote omitted) https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2024/04/08/240408c.html (viewed June 8, 2024).

[12] https://www.tennessean.com/story/news/religion/2023/06/14/southern-baptist-convention-news-ban-women-pastors-southern-baptists/70319638007/ (viewed May 26, 2024).

[13] https://www.degruyter.com/document/doi/10.1515/9783110434392-022/pdf?licenseType=restricted (viewed May 26, 2024).

intervening to change that is a change of [Allah]'s creation, which is completely rejected." Deepa Bharath, David Crary and Mariam Fam, "Transgender inclusion? World's major religions take varying stances on policies toward trans people," *Associated Press* (April 10, 2024).[14]

By inventing a new right to taxpayer funding of transgender operations, the panel decision unjustifiably conflicts with nearly every major religion in the United States, thereby creating a crisis of religious liberty for many who oppose being required to support this.

CONCLUSION

The petition for rehearing should be granted and the panel decision should be vacated.

Dated: June 10, 2024

Respectfully Submitted,

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[14] https://apnews.com/article/religion-transgender-christianity-islam-hinduism-buddhism-judaism-804a93f0db2a6eeff84159665078e494 (viewed May 26, 2024).

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation specified in the Federal Rules of Appellate Procedure, in the following respects:

(a) Exclusive of the exempted portions, this brief contains 2,506 words.

(b) The brief has been prepared in proportionally spaced typeface, using Microsoft Word in 14-point Times New Roman font.

(c) As permitted by Federal Rule of Appellate Procedure 32(g)(1), the undersigned has relied upon the word count feature of his word processing system in the preparation of this Certificate of Compliance.

Dated: June 10, 2024

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